THE ELEVENTH ARTICLE OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.[1]

Of the important questions of constitutional law now before the country, none more vitally affects the peace and harmony of our dual system of government than that of the power of a federal court to enjoin a state officer from enforcing the provisions of a state statute in conflict with the Constitution of the United States. This question usually arises in connection with the Eleventh Amendment, which provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." Serious controversies regarding the issue of injunctions by federal courts against state officers have arisen in New York, North Carolina, Alabama, Missouri, Kansas, Minnesota, and other States. A convention of Attorneys-General from a number of States, held at St. Louis in September and October, adopted a memorial to the President and Congress praying that the jurisdiction of the circuit courts of the United States might be curtailed in respect of suits brought to restrain state officers from enforcing state laws or the orders of state administrative boards. The President in his annual message to Congress called the matter to the attention of that body, and stated that discontent was often expressed with the use of the process of injunction by the courts where state laws were concerned. As soon as Congress assembled, numerous bills were introduced proposing to curtail the power of the federal courts to issue injunctions and several joint resolutions to amend the Constitution of the United States in that respect were also introduced. The question will, perhaps, figure prominently in the next presidential campaign. It may, therefore, be useful and interesting at this time to review the history of the Eleventh Amendment in order to see what light it throws upon the intention of its framers. Did they intend, in prohibiting suits by an individual against a State, likewise to deny to the courts of the United States the power to enjoin a state officer from enforcing a state statute in conflict with the national Constitution?

[1] An address delivered by William D. Guthrie before the New York State Bar Association at its Annual Meeting held in New York City, January 25, 1908.

In 1787 and 1788, when the adoption of the Constitution was under consideration by the people of the United States, conflicting views were entertained as to the suability of a State by an individual for the recovery of claims against it. Hamilton, Madison and Marshall expressed the opinion that a State would not be suable by an individual under the Constitution as drafted. A number of prominent men, conspicuous among whom were Edmund Pendleton, Patrick Henry and George Mason, were of opinion that the language of the judicial clause conferred jurisdiction to entertain and determine such a suit. Some urged this as an objection to the Constitution. Others, including James Wilson, of Pennsylvania, and Edmund Randolph, of Virginia, two of the most distinguished lawyers and publicists of the day and members of the Constitutional Convention, contended not only that jurisdiction was conferred but that it was wise and necessary that such jurisdiction should exist. Wilson urged that "when a citizen has a controversy with another State, there ought to be a tribunal where both parties may stand on a just and equal footing," and Randolph argued that the jurisdiction would tend "to render valid and effective existing claims, and secure that justice, ultimately, which is to be found in every regular government." The Constitution was adopted as submitted with the understanding that amendments would be promptly proposed. The First Congress submitted twelve amendments, ten of which were adopted, but the subject of the suability of a State was not mentioned in any of them.

The question shortly arose for judicial decision in an action brought by Chisholm, a citizen of the State of South Carolina, against the State of Georgia in the Supreme Court of the United States under its original jurisdiction.[2] The action was in assumpsit to recover a debt. The court then consisted of Chief Justice Jay and Justices Cushing, Wilson, Blair, Johnson and Iredell. On February 18, 1793, the court held, Mr. Justice Iredell alone dissenting, that under the Constitution as originally adopted a State could be sued in that court by a citizen of another State in an action of assumpsit to enforce the payment of a contract debt. This decision, which was followed by the commencement of the suit of *Vassal* v. *Massachusetts,* created irritation and alarm among the States and particularly among those which were heavily burdened with debt. The anti-Federalist prints were loud in invectives against the decision, which was termed a viola-

[2] 2 Dall. 419.

tion of the sovereignty of the States, and it was declared that the people were "called upon to draw their swords against this invasion of their rights." It has been said, though with some exaggeration, that "the States fairly rose in rebellion against the decision." Four States formally protested. Although Georgia had been the first State to invoke the original jurisdiction of the Supreme Court, it nevertheless refused to appear in the *Chisholm* suit, and filed a remonstrance and protestation against the exercise of jurisdiction. After the decision, it openly defied the authority of the national judiciary. Indeed, it is stated by McMaster, Cooley and other writers that the legislature of Georgia at once passed a law subjecting to death without benefit of clergy any officer who should attempt to serve a process in any suit against the State, but no record of any such statute can be found. As has been suggested, it was probably a proposed bill which passed only the lower branch of the legislature. The legislatures of Virginia, Massachusetts and Connecticut instructed their senators and representatives to secure the adoption of an amendment to the Constitution which should prevent suits against a State by an individual.

On February 20, 1793, two days after the opinions in *Chisholm* v. *Georgia* were delivered, a resolution was offered in the United States Senate proposing an amendment of the Constitution in the following terms:

"The judicial power of the United States shall not extend to any suits in law or equity, commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State."

The proposed amendment was debated to some extent in the Second Congress, but it was not then passed, and went over to the next Congress. In the Third Congress, on January 2, 1794, Caleb Strong, one of the Senators from Massachusetts, moved the adoption of a resolution which changed the form of the proposed amendment so as to read as follows:

"The judicial power of the United States shall not *be construed to* extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

The amendment was finally accepted in this form on March 4, 1794, and at once submitted to the legislatures of the several States for ratification, but up to March, 1797, there were still eight States which had not acted, probably because the political clamor had sub-

sided, and there was no longer any excitement on the subject. In fact, Congress had to request the President to communicate with the outstanding States. Finally, in a message from President Adams to Congress dated January 8, 1798, the proposed amendment was declared to have been ratified by three-quarters of the States, and it thereupon became the Eleventh Article of Amendment to the Constitution of the United States. New Jersey and Pennsylvania had refused their ratification, while South Carolina and Tennessee had not then acted upon it.

The unusual and peculiar wording of the amendment first attracts attention. Instead of declaring how the Constitution shall read in the future, it declares how it shall "not be construed." This phraseology was used for political reasons and out of concession to the susceptibilities of the advocates of state rights. Extremists wanted a declaration that would not only overrule the recent construction of the Constitution by the Supreme Court and deny that such a power had ever existed, but would also oust all jurisdiction in pending as well as future cases. The amendment, therefore, does not purport to amend or alter the Constitution, but to maintain it unchanged, while controlling its scope and effect by authoritatively declaring how it shall not be construed.

Speaking of the language of the amendment, Chief Justice Marshall said in *Cohens* v. *Virginia*[8]: "It is a part of our history, that, at the adoption of the constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts formed a very serious objection to that instrument. Suits were instituted, and the court maintained its jurisdiction. The alarm was general; and, to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the state legislatures. That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more States, or between a State and a foreign State. The jurisdiction of the court still extends to these cases; and in these a State may still be sued. We must ascribe the amendment, then, to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which

[8] 6 Wheat. 264, 406.

might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister States would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States.

"The first impression made on the mind by this amendment is, that it was intended for those cases, and for those only, in which some demand against a State is made by an individual in the courts of the Union. If we consider the causes to which it is to be traced, we are conducted to the same conclusion. A general interest might well be felt in leaving to a State the full power of consulting its convenience in the adjustment of its debts or of other claims upon it; but no interest could be felt in so changing the relations between the whole and its parts, as to strip the government of the means of protecting, by the instrumentality of its courts, the constitution and laws from active violation."

It will also be observed that the amendment does not refer to suits against a State by one of its own citizens. This was undoubtedly because the Constitution did not extend the judicial power of the United States, when dependent upon the character of the parties, to controversies between a State and its own citizens, but only to controversies between a State and citizens of another State, or citizens or subjects of foreign States. The distinction between jurisdiction dependent upon the nature or subject matter of the controversy irrespective of the character of the parties, such as cases arising under the Constitution, laws and treaties of the United States, and jurisdiction dependent upon the character of the parties irrespective of the nature or subject matter of the controversy, had probably not then been as clearly indicated as was subsequently done by Chief Justice Marshall. The failure of the Eleventh Amendment to mention suits against a State by its own citizens gave rise nearly one hundred years later to the contention that a State could be sued in a circuit court of the United States by one of its own citizens in a case arising under the Constitution. This was urged at the October term, 1889, in *Hans* v. *Louisiana* and *North Carolina* v. *Temple*,[4] but the court overruled the contention, and held that a State could not be sued

[4] 134 U. S., 1 and 22.

by an individual in a United States court even in a case arising under the Constitution. Mr. Justice Bradley delivered the opinion of the court. He criticized the reasoning of the majority in *Chisholm* v. *Georgia,* and preferred the dissenting opinion of Mr. Justice Iredell to the effect that, under the Constitution as originally adopted, no suit could be maintained against a State by an individual to enforce its debts except by its consent. Mr. Justice Harlan, however, while concurring in holding that a suit directly against a State by one of its own citizens to enforce a debt was not within the judicial power of the United States, disapproved of the comments made by Mr. Justice Bradley upon the decision in *Chisholm* v. *Georgia* as not necessary to the determination of the case, and expressed the opinion that the prior decision was based upon a sound interpretation of the Constitution as that instrument then was.

It has been stated in opinions of the Supreme Court that a State can be sued in a court of the United States by an individual if it waives its immunity and consents to be sued. But it is difficult to perceive how the consent or waiver of a State can, in any case and under any circumstances, confer upon the federal courts jurisdiction of a suit against it by a citizen of another State or a citizen or subject of a foreign State in the face of the imperative mandate of the amendment that "the judicial power of the United States shall *not be construed to extend* to" any such suit. It is true that the court in the case of *Clark* v. *Barnard*[5] said that the immunity of a State from suit in a federal court was a personal privilege which it might waive at pleasure and that its appearance as a party defendant in a court of the United States would be a voluntary submission to its jurisdiction, but in that case the State intervened as an actor and its intervention was such that it could be treated substantially as a plaintiff and the jurisdiction sustained on the ground that a State may sue an individual in a federal court. Although in the more recent case of *Gunter* v. *Atlantic Coast Line,*[6] Mr. Justice White, delivering the opinion of the court, declared it to be an elementary proposition that a State could waive its immunity, it will be observed that in that case the suit was in fact against an officer of the State of South Carolina and that the State itself was not a party to the record. It seems to me, with all deference, that the court has not yet squarely passed upon the point, nor, so far as I know, has

[5] 108 U. S. 436, 447. [6] 200 U. S. 273, 283, 284.

it ever questioned the fundamental principle that a federal court cannot exercise jurisdiction in any case to which the judicial power of the United States, as delegated and defined in the Constitution, does not extend. An entirely different question is presented when we consider whether an officer of a State can consent or be authorized to consent to be sued in a federal court; in other words, whether he can waive the defense that the State is a necessary party. It does not follow that, because a State cannot be sued, it may not authorize its agent to defend without pleading the absence of the real party in interest, and the denial of jurisdiction over the State as principal does not necessarily imply a denial of jurisdiction over the officer when doing or attempting to do an illegal act as its agent or representative. So, also, a different question is presented under the later amendments, which may be held to have qualified the Eleventh Amendment in authorizing Congress to enforce their provisions by appropriate legislation.

In construing the Eleventh Amendment for the purpose of ascertaining its true intent and meaning, as indeed in construing most of the provisions of the Constitution and its contemporaneous amendments, reference to the history and common law of England is generally the safest guide as to what was understood and intended at the time. In that history will be found the true sources of our institutions, for they are essentially and predominantly English. The legal and political institutions of England were constantly in the minds of the framers and of the people. The common law had long been regarded with affection and reverence as the birthright of Americans and the guardian at once of their private rights and public liberties. Indeed, the Continental Congress, assembled in October, 1774, had declared the colonies entitled as of right to the common law.

The theory of the immunity of a State or of the United States from suit by an individual without its consent is frequently asserted to be analogous to the monarchical principle as to the immunity of the king from suit without his consent commonly expressed in the maxim that "the king can do no wrong." The idea seems to have been that in England it would be considered an invasion of the sovereignty of the crown and derogatory to its dignity to subject the king to a suit by an individual except with his consent, to be granted or refused in his arbitrary discretion. It is very doubtful whether any such idea finds support in the common law or history of England and the tradi-

tional usage and experience of that country, at least to the extent often insisted upon.

On the contrary, it had long been regarded in England as settled law that the subject was entitled to an effective legal remedy for any invasion of his legal rights by the king or the government. He had a right to sue the king for the restitution of property or money or the recovery of damages for breach of contract, and to sue officers of the crown for any tortious acts. The practice established for centuries had been to present to the king a petition praying leave to sue him, and the custom was for the king as of course to endorse on the petition his fiat that right be done. Thereafter the action proceeded as any other action between subject and subject. This right was conceded to aliens as well as to subjects. Although the leave to sue was nominally or theoretically granted as a matter of grace and not upon compulsion, it was in fact the constitutional duty of the king to grant it, and it was seldom denied. Under the common law, the subject was entitled as matter of right—as one of the immemorial liberties of Englishmen—to inform his king of the nature of any grievance, and thereupon, in the language of Blackstone, "as the law presumes that to know of any injury and to redress it are inseparable in the royal breast, it then issues, as of course, in the king's own name, his orders to his judges to do justice to the party aggrieved."

The nature of the proceeding under a petition of right has been passed upon by the Supreme Court of the United States in several cases, and its decisions clearly show that the remedy is not to be regarded as a mere matter of grace, but as a right to sue and obtain redress in the class of cases to which it applies. Thus, Chief Justice Marshall, delivering the opinion of the court in *Marbury* v. *Madison*[7] at the February term, 1803, said: "In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court." In *United States* v. *O'Keefe*[8] the court at the December term, 1870, examined the nature of the remedy in construing the act of Congress of July 27, 1868, now section 1068 of the U. S. Revised Statutes. Mr. Justice Davis, speaking for the court, said: "This valuable privilege, secured to the subject in the time of Edward the First, is now crystallized in the common law of England.

[7] 1 Cranch 137, 162. [8] 11 Wall. 178, 183.

As the prayer of the petition is grantable *ex debito justitiae*, it is called a petition of right, and is a judicial proceeding, to be tried like suits between subject and subject. * * * It is of no consequence that, theoretically speaking, the permission of the crown is necessary to the filing of the petition, because it is the duty of the king to grant it, and the right of the subject to demand it. And we find that it is never refused, except in very extraordinary cases, and this proves nothing against the existence of the right. * * * If the mode of proceeding to enforce it be formal and ceremonious, it is nevertheless a practical and efficient remedy for the invasion by the sovereign power of individual rights." And in the case of *Carlisle* v. *United States*[9] the court held that under the proceeding known as the petition of right the government of Great Britain accorded "the right to prosecute claims against such government in its courts" not only to subjects but to aliens. Later still in the famous case of *United States* v. *Lee*,[10] which was an action at law to recover the property known as the Arlington National Cemetery from the possession of officers of the United States government, Mr. Justice Miller, delivering the opinion of the court, said: "It is believed that this petition of right, as it has been practised and observed in the administration of justice in England, has been as efficient in securing the rights of suitors against the crown in all cases appropriate to judicial proceedings, as that which the law affords to the subjects of the king in legal controversies among themselves."

The remedy under the petition of right has continued unimpaired to the present time. The procedure is now regulated by the statute 23 and 24 Victoria, ch. 34, passed July 3, 1860. The statute provides that the king by means of this proceeding may be sued at law or in equity as the particular case may require, and that the remedy afforded "shall comprehend every species of relief claimed or prayed for in any such petition of right, whether a restitution of any incorporeal right, or a return of lands or chattels, or a payment of money or damages, or otherwise." In granting or refusing the petition, the king acts under the advice of the home secretary, and the latter is responsible to Parliament in case he shall arbitrarily or wrongfully advise a refusal.

The petition of right, however, is available only in cases seek-

[9] 16 Wall. 147, 156. [10] 106 U. S. 196, 205.

ing to obtain restitution of lands or goods, or, if restitution cannot be given, compensation in money, or where the claim arises out of a contract, as for goods supplied to the crown or to the public service. It does not extend to cases of torts. If the king personally should commit or threaten to commit a tort, such, for example, as a trespass, he cannot be proceeded against in either a civil or criminal court, and the ordinary law courts have no means of restraining or punishing him personally or affording redress against him for any wrong done by him personally. Not only does the maxim that "the king can do no wrong" prevent any ordinary court from granting relief against the king himself, but the courts have no jurisdiction against him in cases of tort.

Nevertheless, this ancient and fundamental maxim never meant that the king was above the law or could violate the law with impunity, nor was it ever understood in any such sense as that everything done by the king was to be regarded as just and lawful. On the contrary, it was fearlessly proclaimed in the days of Bracton that the king was below the law and bound to obey it, and in his coronation oath he swears to observe and respect it.

But whatever might have been the personal immunity of the king, it had been settled at common law long prior to the adoption of the Constitution that such immunity did not extend to any officer or servant of the crown. The very exemption of the king from responsibility before the courts in cases of torts conclusively established the personal responsibility of some officer or servant of the crown, and the direction or authority of the king did not constitute any warrant or defense for a wrongful and illegal act done by any such officer or servant.

As the Supreme Court said in the case of *Langford* v. *United States*[11]: "The English maxim does not declare that the government, or those who administer it, can do no wrong; for it is a part of the principle itself that wrong may be done by the governing power, for which the ministry, for the time being, is held responsible." The boast of Englishmen for centuries had been that no officer of the government was above the ordinary law. Professor Dicey says in his interesting lectures at Oxford as a successor of Blackstone in the Vinerian Professorship: "In England the idea of legal equality, or of the universal subjection of all classes, to one law administered by the ordinary courts, has been pushed to its utmost limit. With us

[11] 101 U. S. 341, 343.

every official, from the prime minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character, but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorize as is any private and unofficial person." And Anson in his Law and Custom of the Constitution points out that the English constitution "has never recognized any distinction between those citizens who are and those who are not officers of the state in respect of the law which governs their conduct or the jurisdiction which deals with them." In the famous case of *Entick* v. *Carrington*,[12] a secretary of state sought immunity as an officer of the crown from a suit for damages by pleading reasons of state for an unlawful act, but Lord Chief Justice Camden declared that "with respect to the argument of state necessity or a distinction that has been aimed at between state offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions." And one hundred years later, in the case of *Feather* v. *The Queen*,[13] 1865, Lord Chief Justice Cockburn declared that "no authority is needed to establish that a servant of the crown is responsible in law for a tortious act done to a fellow subject, though done by the authority of the crown, a position which appears to us to rest on principles which are too well settled to admit of question, and which are alike essential to uphold the dignity of the crown on the one hand, and the rights and liberties of the subject on the other."

Moreover, the rule of *respondeat superior* does not apply to the king. The conclusive legal presumption is that the king can do no legal wrong, and this leads to the further conclusive presumption that, in the eye of the law, he cannot authorize or direct a wrong. Every executive officer of the crown is, therefore, treated as if he were a principal, and as such is held personally responsible whenever any legal right of the subject has been invaded by him, although he may have acted under the direct order of the king and

[12] (1765) reported by Hargrave in 19 State Trials, 1030, 1073.

[13] 6 B. & S. Q. B. 257, 297.

even in his presence. The civil irresponsibility of the king for tortious acts could not have been maintained with any show of justice if the officers and agents of the crown had not been held personally responsible for any illegal acts committed by them and if the king had not been compelled to act through responsible agents. From the earliest times, it has been deemed essential that the king should always act through an officer or servant, in order that there might be some one upon whom responsibility could be fastened. Lord Coke declares in his Institutes that "the king, being a body politique, cannot command but by matter of record." Custom and statute early required that all executive acts to which the sovereign was of necessity a party should be done in certain forms and authenticated by the signature or seal of some officer. The intervention of an officer is always necessary. In fact, some minister or officer of the crown can be held fully responsible for any illegal act. Anson states "that there is hardly anything which the sovereign can do without the intervention of written forms and nothing for which a minister is not responsible."

Although the cases in England against officers of the crown were generally at law, there can be no reasonable doubt that the Court of Chancery, at the time the Constitution was adopted, had full power, by means of the writ of injunction, to restrain an officer of the crown from violating the law where the remedy at law in a suit for damages or for possession of property, real or personal, would have been wholly inadequate and ineffective. The great state trial known as the *Case of the Bankers,* in which Lord Somers was overruled by the House of Lords, left no doubt as to the principle and the jurisdiction of the courts in suits against crown officers. As Professor Goodnow has shown in his able and interesting work on Comparative Administrative Law, the English courts had long been accustomed in one way or another to control servants of the crown and executive officers of the government and to compel them to obey the law. All the great writs, which were at first prerogative writs, had been originally issued to control administrative or judicial officers. Such was the function of mandamus, habeas corpus, quo warranto, prohibition. Injunctions, it is true, seem rarely to have been made use of in England as a means of preventing administrative action, and only a few cases can be found where it was so used, but, on settled principles, any administrative or executive officer threatening to do an illegal act which would injure the individual in his property

rights, was amenable to the jurisdiction of courts of equity in controversies requiring its intervention.

It is also true that no cases are to be found in England where officers have been held responsible in damages for enforcing an act of Parliament or have been restrained from carrying its provisions into effect. This, of course, is the result of the legislative sovereignty of Parliament and of the fact that there are no constitutional limitations imposed upon it. Nevertheless, the same principles which make government officers in England subject to the ordinary law and the ordinary courts for any illegal act done or threatened would clearly authorize the issue of injunctions restraining the enforcement of an unconstitutional statute if there were any constitutional limitations upon the legislative power of the English Parliament. Thus, for example, a colonial statute, or a municipal or administrative rule, by-law or ordinance in conflict with an act of Parliament would be illegal and void, and, within settled principles, its enforcement could be restrained if other grounds of equity jurisdiction existed.

In the light of the long-settled and well-known rules of the common law, establishing the distinction between suits against the king under the petition of right and suits against officers of the crown for violating the legal rights of individuals, it is most significant and persuasive, if not convincing, that the framers of the Eleventh Amendment confined its language to suits directly against a State, and did not attempt to prohibit suits against officers of a State when acting as its representatives. They could hardly have intended that such a principle as that "the king can do no wrong" should have any place in our system of government to the prejudice of the constitutional rights of the individual. "We have no king to whom it can be applied." They surely did not intend to afford less protection and less redress against the invasion of the rights of citizens by those in power than was afforded in monarchical England to the subjects of the king. They could not have been ignorant of the famous cases which had established the legal responsibility of all officers of the English government and their subordination to the jurisdiction of the ordinary courts of justice. They clearly contemplated that state statutes might be passed in conflict with the Constitution of the United States and that these statutes would necessarily have to be enforced or attempted to be enforced by state officers. They must have appreciated that if state officers, as agents of their respective States, were

granted immunity from suit in a court of the United States because they were acting for and on behalf of their States, the Constitution could in many respects be rendered ineffective and nugatory. The failure to prohibit suits against officers of a State must, therefore, have been intentional. It is highly improbable that any one at the time conceived that the language adopted was broad enough to prohibit suits against officers of a State. On the contrary, it is proper to assume that the framers of the Eleventh Amendment did not intend to permit an officer of a State, while acting under the color or excuse of an unconstitutional state statute, to invade or deny any right guaranteed by the Constitution of the United States and be immune from suit in a court of the United States merely because he was acting in a representative capacity as an agent of the State. The courts of the United States were specially charged with the preservation of the Constitution, so far, indeed, as it can be preserved by judicial authority. The Federalist shows how clearly it was contemplated that the federal courts were to have power to overrule state statutes in manifest contravention of the Constitution. If state officers were withdrawn from the jurisdiction of the national courts, their oath to support the Constitution of the United States might become a mere empty ceremony of no enforceable obligation or sanction. If officers of a State could not be sued in equity in a federal court to enjoin the enforcement of unconstitutional state statutes, many of the provisions of the Constitution, of equal authority with the Eleventh Amendment, might not be effectually enforceable except by the grace of the States. The prohibitions against the States, which existed when the Eleventh Amendment was adopted, such as that no State shall emit bills of credit, or make anything but gold and silver coin a tender in payment of debts, or pass any bill of attainder, or any *ex post facto* law, or any law impairing the obligation of contracts, or lay imposts or duties on imports or exports, might to a great extent be nullified and rendered practically ineffective, if officers of a State could not be sued in a federal court. Indeed, the thirteenth, fourteenth and fifteenth amendments would be deprived of a great part of their intended effect if state officers enforcing unconstitutional state laws and clothed with the power of the State could not be sued in a federal court. As each of these subsequent amendments, however, provides that "Congress shall have power to enforce this article by appropriate legislation," it has been suggested that this provision may be construed as limiting the prohibition of the Elev-

enth Amendment and empowering Congress to confer on the courts of the United States jurisdiction of suits against States or state officers as an appropriate means of enforcing the later amendments. Mr. Justice Shiras referred to this view in the case of *Prout* v. *Starr* [14] and said: "Much less can the Eleventh Amendment be successfully pleaded as an invincible barrier to judicial inquiry whether the salutory provisions of the Fourteenth Amendment have been disregarded by state enactments."

The courts of the United States and of the several States have generally adopted and applied the English common law as to the amenability of executive and administrative officers to the jurisdiction of the ordinary courts and their personal responsibility for any illegal acts done by them or under their direction. There is no longer any question but that the Eleventh Amendment does not shield state officers from suits at law in a court of the United States to recover damages for any invasion of private rights under the color of an unconstitutional statute, or to recover possession of real property in the custody of such officers. The rule is axiomatic that no officer in this country is so high that he is above the Constitution of the United States, and that no officer of the law, state or national, may violate it under the color or excuse of a statute, national or state, in conflict with its provisions. The fact that an officer has acted on behalf of a State under the direction or authority of an unconstitutional statute or under the orders of a superior constitutes no defense to an action for restitution or for damages for any invasion of individual rights any more than the command of the king or the prime minister would constitute a defense in England. The alleged law is treated as a nullity and absolutely void for all purposes, except perhaps as negativing the existence of malice or bad faith or criminal intent. But it confers no warrant or authority and affords no protection.

The fundamental reasoning upon which these conclusions are based is that the State, the abstract political entity, can speak and act only by valid laws, that an unconstitutional statute cannot be its legal act, that it cannot, legally speaking, authorize any act in conflict with the Constitution, that no officer of a State, not even the Governor, can have any legal duty or executive function to disregard or violate the Constitution, and that whatever wrong is attempted in its name is to be conclusively imputed to its officer, who cannot plead his representative capacity. The

[14] 188 U. S. 537, 543.

distinction between the government of a State and the State itself is elucidated by Mr. Justice Matthews in the leading case of *Poindexter* v. *Greenhow*.[15]

More difficult, however, are questions which arise in connection with suits in equity to restrain state officers from enforcing state statutes alleged to be unconstitutional. The plainest principles of justice would seem in many cases to require a preventive remedy, for it might be of vital importance that an officer be restrained from doing an unlawful act to the irreparable injury of the individual. Manifestly, it would be unfair and unjust to tell the latter that he must wait until his rights have been violated or his property confiscated or destroyed. This point was first presented to the Supreme Court in 1824 in the case of *Osborn* v. *Bank of the United States*.[16] It was then declared, in one of Chief Justice Marshall's famous opinions, that notwithstanding the Eleventh Amendment, a circuit court of the United States had jurisdiction in equity to restrain a state officer from executing or enforcing an unconstitutional state statute when to execute it would violate rights and privileges of a complainant guaranteed by the Constitution of the United States, and work irreparable damage and injury to him, for which no plain, adequate or complete remedy could be had at law.

The general doctrine of the *Osborn* case has never been departed from, and it has sustained numerous suits which have protected property rights from the enforcement of state statutes in conflict with the Constitution of the United States. It is no exaggeration to say that this doctrine has more than any other rendered the Constitution an effective shield against oppressive, tyrannical and confiscatory legislation and compelled the States to obey the supreme law of the Constitution. The reasoning of Chief Justice Marshall is very logical and lucid, and it is most convincing. If, as was then conceded as indisputable, the privilege or immunity of the State as principal was not communicated to the officer as agent, and if an action at law would lie against the officer in which full compensation ought to be made for a legal injury resulting from any unlawful act done in pursuance of an unconstitutional and void statute, there existed no reason why the preventive power of a court of equity should not equally apply to such an officer or why it should not restrain him from the commission of a wrong which it would punish him for committing. "If," continues the Chief Jus-

[15] 114 U. S. 270, 290. [16] 9 Wheat. 738.

tice, "the party before the court would be responsible for the whole injury, why may he not be restrained from its commission, if no other party can be brought before the court?" It is pointed out that the very fact that the State could not be sued was a reason for permitting the suit to proceed in its absence against the officer or agent. Thus, we have another example of how, in the evolution of legal principles, the same causes produce the same results. As in England the fact that the king cannot be sued in the ordinary courts for a wrong leads to the rule that his immunity or irresponsibility is not to be extended to his servants or agents and that the latter are to be held personally liable for whatever they do under the king's orders in violation of the legal rights of an individual, so with us the fact that the State cannot be sued in a federal court leads to the rule that its immunity or irresponsibility is not to be extended to its officers and that they are suable as responsible principals, even when acting under a state statute and as its agents or representatives.

Chief Justice Marshall also said in the *Osborn* case that the court thought it might "be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently the 11th amendment, which restrains the jurisdiction granted by the Constitution over suits against states, is, of necessity, limited to those suits in which a state is a party on the record. The amendment has its full effect, if the constitution be construed as it would have been construed had the jurisdiction of the court never been extended to suits brought against a State, by the citizens of another State, or by aliens. The State not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties." This reasoning was reaffirmed by the Supreme Court as late as 1872 in the case of *Davis* v. *Gray*,[17] which was a suit against the governor of the State of Texas. But, it has since been repudiated in later cases, and the court has declared that "it must be regarded as a settled doctrine of this court, established by its recent decisions, that the question whether a suit is within the prohibition of the Eleventh Amendment is not always to be determined by reference to the nominal parties on the record." [18]

[17] 16 Wall. 203, 220. [18] In re Ayers, 123 U. S. 443, 487.

It may, nevertheless, be interesting to re-examine the doctrine enunciated by Chief Justice Marshall and to inqure whether, after all, it does not embody the true and sound rule which should govern this question, particularly in view of the fact that the cases which have departed from his reasoning have failed to indicate any definite criterion to guide us in determining when a suit against a state officer is or is not to be deemed a suit against the State within the true meaning of the Eleventh Amendment. The question should be considered as if the jurisdiction of the federal courts had never been extended to suits by an individual against a State. The controlling inquiry in a suit against a state officer ought logically to be whether the relief or remedy sought can be granted in the absence of the State as a party defendant; in other words, whether it is or is not a necessary and indispensable party, to be determined by the result or burden of the judgment which may be entered. If, for example, the suit is to enjoin the enforcement of an unconstitutional statute regulating rates or imposing taxes, it must be presumed that the State has not authorized the wrong, that it can have no legal concern or interest in a void enactment of its legislature, and that it cannot be heard to assert any right to have its officers violate the Constitution of the United States for its benefit. If, on the other hand, the relief or remedy sought will affect the property rights or funds of the State, or compel it to pay its debts, or require the specific performance of a contract by the State, or the doing or omitting to do any act by the State, the court must needs hold that it is a necessary and indispensable party, and that, as it cannot be sued in a federal court for want of jurisdiction over it, the suit must be dismissed. This dismissal, however, would not be for want of jurisdiction or judicial power over the individual state officer as defendant, nor because the suit was against the State—for the State was not a party and its presence was sought to be dispensed with—but because the State was an indispensable party defendant and the suit could not proceed in its absence. The result of recurring to this view would be to simplify the consideration of many cases and reconcile much conflicting reasoning. We would then have a definite and logical criterion to guide us in cases against state officers. If the court found that the State was not a necessary and indispensable party, the issue in such cases would be narrowed to the inquiry whether the relief should be granted within established principles of equity jurisprudence and procedure.

The Supreme Court has held that notwithstanding the general

principle that a court of equity has no jurisdiction of a bill to stay criminal proceedings, nevertheless it may enjoin a state officer from instituting such proceedings where property rights are about to be invaded and destroyed through the instrumentality of an unconstitutional statute providing for its enforcement by criminal proceedings. The jurisdiction of a court of equity ought not to be ousted simply because the State has authorized its officers to enforce unconstitutional regulations affecting property rights by a criminal instead of a civil action. The nature of an essentially civil question or controversy, such as one between shippers or passengers on the one side and a railroad company on the other, as to the reasonableness of rates, cannot be changed by legislative fiat. The exercise of such a jurisdiction to restrain criminal proceedings has been found necessary in many recent cases where a defense on a criminal trial before a jury would afford no fair or adequate protection to those whose property rights were affected. The litigation, for example, under a bill in equity to restrain the enforcement of an unconstitutional criminal statute regulating rates presents a controversy of a civil nature with the officer and not with the State, and the only question is whether a court of equity should intervene or leave those against whom criminal proceedings are threatened to their defense by demurrer to the indictment or trial on the merits. The latter will always be done when a defense at law will afford reasonably fair and adequate protection. But when a defense at law will not afford due protection, and irreparable injury to property is threatened, there exists no reason why a court of equity should not intervene and grant protection and relief.

It may seem to many doubtful whether the two leading cases which are now attracting so much attention, namely, *In re Ayers* [19] and *Fitts* v. *McGhee* [20], necessarily presented any question under the Eleventh Amendment, and whether they should not have been disposed of solely upon the ground that a court of equity ought not to have enjoined the threatened suits or prosecutions. Neither of the suits in equity discussed in these two cases would probably have been maintainable under the general principles of equity jurisprudence even if a State had been suable in a court of the United States, for no irreparable injury was threatened, and the opportunity of defense at law seemed to afford reasonable protection.

The question of the right to sue a state officer to restrain the

[19] 123 U. S. 443. [20] 172 U. S. 516.

enforcement of an unconstitutional statute regulating the rates and charges of railroad companies is now pending in some of its aspects before the Supreme Court in important cases involving statutes of Minnesota and North Carolina. These cases have been fully and ably argued and are under advisement, and they may lead to a reconsideration of some of the reasoning in the prior cases. A comprehensive decision may, therefore, shortly be delivered which shall remove some of the reasons for the existing misunderstanding, prejudice and conflict between the state and federal courts.

The time at our disposal renders it impossible to consider the many great and interesting cases which have arisen under the Eleventh Amendment and which frequently carry us into the realm of public law and statesmanship. The leading decisions are, of course, in the Supreme Court, but many instructive opinions will be found in the lower federal courts. The constant increase of governmental functions and of interference with individual liberty and action is certain to be a fruitful source of litigation in the future and to call for frequent consideration of the scope of the Eleventh Amendment.

In discussing the subject of suits to restrain the enforcement of state statutes alleged to be unconstitutional, we should not overlook or pass unnoticed the attempts made in recent enactments regulating rates to coerce or intimidate railroad and other public service corporations into immediate obedience and abandonment of their constitutional right to appeal to the courts, by imposing upon them enormous and unreasonable fines and penalties, or by threatening them with the forfeiture of the protection of the government. Heavy fines or penalties are attached to each violation of the law; and as the transactions of these corporations are generally very numerous, disobedience of the statute, if only in good faith for the purpose of testing its validity, would in a few days involve the risk of bankruptcy. The avowed or ill-concealed purpose of these fines and penalties and of the resort to the criminal law is to prevent any interference by courts of equity. The idea, advanced in many quarters and under many disguises, seems to be that corporations shall be outlawed unless they consent to abandon their right to appeal to the courts for protection against unconstitutional statutes and void and oppressive enactments. This spirit is quite widespread. For example, while the federal employers' liability act, recently declared uncon-

stitutional by the Supreme Court of the United States, was under advisement by that court, the President in his Jamestown speech criticised the railroad companies for having contested the validity of the statute and suggested that "the law should be such that it will be impossible for the railroads successfully to fight it without thereby forfeiting all right to the protection of the Federal Government under any circumstances."

The courts have repeatedly pointed out that the owners of property devoted to a public use are entitled to a fair and adequate judicial investigation if they contend that the rates or charges prescribed by a legislature are unreasonable and confiscatory. This is but recognizing that the owners of railroads and other properties are entitled to a day in court, just as the humblest person is entitled to his day in court when his constitutional and vested property rights are invaded by the government. If the private property of the individual be taken for a public use, it would, of course, be obviously unfair and unjust to permit the legislature to say conclusively what should be paid to him and deny any adequate remedy in the courts to review the legislative fiat. The same principle applies to public service corporations. They are entitled to appeal to the courts to pass upon the validity of any legislation which attempts to compel them to render services at a rate fixed by the legislature if they contend that such rate is unreasonably low and confiscatory; and pending the judicial investigation, they ought not to incur the risk of accumulating penalties. The New York Public Utilities Act of last year recognizes this in principle. But instead of granting a hearing or providing for any judicial proceeding in which the reasonableness of the statutory rates may be promptly investigated, the constant effort seems to be to render resort to the courts so dangerous that property owners will abandon their right to a day in court rather than take the risks involved in allowing penalties to accrue and accumulate, which might subject their property to confiscation. Thus, in the recent New York gas statute, declared unconstitutional by the United States circuit court, no judicial investigation was afforded and the penalties imposed were at the rate of $1,000 for each overcharge or violation of the law. As the Consolidated Gas Company alone had upwards of 390,000 customers, an overcharge on only one month's bills, pending an attempt to test the law in good faith, would involve the fabulous total of $390,000,000 in penalties, or nearly five times the value of

the whole property of the company! In fact, if the New York statute, at least in this respect, is not nullified by the Supreme Court on the pending appeal, the Consolidated Gas Company may be absolutely ruined for having asserted its legal right to a fair judicial investigation before being compelled to accept what it insisted (and what the court has so far held) was a confiscatory and unreasonable rate; that is to say, for daring to insist on its day in court. The Kansas statute regulating stockyards which was declared unconstitutional by the Supreme Court, imposed penalties which might have aggregated $15,000,000 in one day, or nearly twice the value of all the property of the Stockyards Company. The recent railroad statute in North Carolina imposes fines which would amount to $2,500,000 per day, and in a few days would bankrupt the railroad companies. The Minnesota railroad statute imposes penalties which in one month might aggregate several hundred million dollars!

Speaking of these penalties, United States Circuit Judge Lochren justly said: "There is no question but that such legislation is vicious, almost a disgrace to the civilization of the age, and a reproach upon the intelligence and sense of justice of any legislature which could enact provisions of that kind."

If any such policy of coercion and intimidation can possibly be enforced by the state or national governments, in any form or under any subterfuge whatever, we shall no longer be living under a constitutional government with effective guaranties of individual rights and liberties. If Congress or a state legislature can compel any class to submit to an unconstitutional statute by imposing ruinous fines and penalties, or other provisions intended to operate *in terrorem*, or by threatening to deprive them of the protection of the government, then the constitutional limitations imposed by the people can be readily circumvented and nullified, and our supposed rights and liberties will exist only in the grace or self-restraint of legislatures. One class is selected to-day, but another class will be selected to-morrow, depending only on the interest or prejudice or temptation or caprice of the temporary majority. Such an exercise of arbitrary and irresponsible power is in utter conflict with the whole theory of our institutions and in utter disregard and defiance of those fundamental and immutable principles of justice under which alone can free governments exist or endure. As Chief Justice Marshall said in the famous case of *Marbury* v. *Madison*—and the court was then facing a hostile

Executive, a hostile Congress and a hostile public opinion—"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. . . . The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."

Some of the bills now pending before Congress propose to deprive the federal courts of the power to issue preliminary injunctions in these cases. This would be a policy fraught with immeasurable danger to property interests as well as to personal liberty. It would frequently amount to a complete denial of justice. Ruin might readily attend the delay of litigation. But, undoubtedly, some reform is called for. There can be no question but that preliminary injunctions against the enforcement of state statutes regulating public service corporations should never be granted without prior notice to the representatives of the people and full opportunity to be heard and then only upon the clearest showing of threatened irreparable injury pending the delay of a full hearing on the merits. Such cases ought not only to be given the earliest possible hearing, but the courts should insist that both sides proceed with the utmost expedition in the taking of testimony. A hearing in open court and not before a master would greatly facilitate this result. The people are entitled to a speedy determination of the questions involved in order that they may promptly have the benefit of the statute if it be constitutional or that they may at once amend it if it be unconstitutional. There is no reason why in the majority of cases such a suit should not be ready for final hearing and actually heard within sixty days or why it should not be finally disposed of in the appellate courts within less than a year. It should have preference on all calendars. The expedition act of Congress, applicable to cases arising under the anti-trust and interstate commerce laws, would furnish a good model for cases involving the validity of state laws. The conditions which now confront the people in many States, where statutes regulating public service corporations are often tied up for years by litigation, tend to create discontent, impatience and dissatisfaction with the courts and to engender a desire for revolutionary change from an intolerable situation. Laws

regulating public utilities are often essential for protection against those who otherwise would have the power of making a prey of the necessities of the people, and it is simply disgraceful that the enforcement of such laws can be delayed by litigation for years after their enactment. As the delays in our criminal procedure are crying for remedy, so the delays in this class of litigation are equally crying for immediate and effective relief. It is of paramount importance that the people should be convinced that they can procure in the courts, and especially in the federal courts, a prompt determination of all litigation affecting the validity of legislation regulating public service corporations which they or their representatives have deemed necessary for their protection against extortion or oppression.

But, above all other considerations, stands the necessity for maintaining the absolute confidence of the people at large in the wisdom and impartiality of the federal judges, who are so often called upon to determine the validity of state statutes alleged to conflict with the Constitution of the United States and in so doing to administer justice as between the State and the individual, as between the majority and the minority. It must surely be a matter of profound concern to us as lawyers that all laymen should appreciate that the exercise of this jurisdiction by the federal courts is necessary for the preservation and perpetuation of the Constitution, and that it is right and just that every citizen should have the privilege of appealing to the national courts for the protection of rights and liberties guaranteed to him by the national Constitution. Equally important is it that the people should appreciate that in entertaining suits to restrain the enforcement of state laws alleged to be unconstitutional, the federal judges are only performing their duty according to their oath of office, which in the noble language prescribed in 1789 pledges them "to administer justice without respect to persons," to "do equal right to the poor and to the rich," and to "faithfully and impartially discharge and perform" their duty "agreeably to the Constitution and laws of the United States." An examination of the cases in which injunctions have been granted against the enforcement of state laws must satisfy any candid mind that in the great majority of cases the power has been impartially exercised, with tact, discretion and prudence, and that such injunctions have only been granted when property rights seemed to be threatened with

irreparable injury. It would be too much to expect infallibility in all these cases, but errors are corrected on appeal.

Assaults upon our judiciary and unwarranted and unjust criticism of our judges undermine the people's trust in the courts and threaten the whole structure of our civilization. The United States judges are justly sensitive to public opinion and distressed by unjust and ignorant criticism. They know how important it is that they should retain public confidence. They realize, as their opinions constantly show, that "next to doing right, the great object in the administration of public justice should be to give public satisfaction." But they cannot sacrifice truth to popularity, the Constitution to present expediency. Those who assail the federal judges should bear in mind that the founders in their wisdom constituted the judicial power our bulwark against unadvised, hasty and tyrannical action on the part of those in power and our shield from "those sudden and strong passions to which we are exposed," and which, if unchecked and unrestrained, may lead to ruin. However unpopular and disagreeable the task may be of setting aside an act of Congress or of a state legislature, however painful it must be to any just man to become the subject of calumny, a federal judge has no choice, no discretion, no will of his own, but must hear and decide according to his conscience every case submitted to him within the jurisdiction of his court as conferred and imposed by the Constitution and laws of the United States. Let us always bear in mind the lofty words of the great Chief Justice in the case of *Aaron Burr,* his decision in which excited so much public prejudice and clamor one hundred years ago, when, speaking of the duty of a judge, he said: "If he has no choice in the case; if there is no alternative presented to him but a dereliction of duty, or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country, who can hesitate which to embrace."

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